

1 HONORABLE BENJAMIN H. SETTLE  
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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT TACOMA

9 SAFETY STAR, LLC, a Missouri limited  
liability company,

10 Plaintiff,

11 v.

12 APTIBYTE, LLC, a Washington limited  
liability company,

13 Defendant.

14 Case No. 2:23-cv-01399-BHS

15 DECLARATION OF STACIA N. LAY IN  
16 SUPPORT OF DEFENDANT'S MOTION  
17 FOR FEES AND A STAY UNDER FED. R.  
18 CIV. P. 41(d)

19 I, Stacia N. Lay, declare and state as follows:

20 1. I am an attorney at Focal PLLC and represent Defendant Aptibyte, LLC in this  
action. I also represented Aptibyte in the first case Plaintiff Safety Star, LLC filed in this Court. I  
am over 18 years of age. This Declaration is based upon personal knowledge unless otherwise  
stated, in which case I believe the information to be true. If called as a witness, I could and  
would testify competently to the information contained herein.

21 **Safety Star's Duplicative Lawsuits**

22 2. On May 15, 2023, Safety Star filed a complaint in this Court against Aptibyte  
alleging claims for trademark infringement and false designation of origin under the Lanham  
Act, unfair competition under Washington's Consumer Protection Act and Washington common  
law, and tortious interference with economic relations. All the claims were based on the alleged  
infringement of trademarks that Safety Star purports to own – B-SAFE and BSAFE BINGO  
(which Safety Star refers to collectively and without differentiation as the "B-SAFE

1 Trademarks”). Attached hereto as **Exhibit 1** is a true and correct copy of Safety Star’s complaint.

2       3.     The case – *Safety Star, LLC v. Aptibyte, LLC*, No. 3:23-cv-05440 (W.D. Wash.)  
 3 (“*Safety Star I*”) – was assigned to the Honorable David G. Estudillo.

4       4.     After filing a stipulated motion extending the deadline for Aptibyte’s response, on  
 5 July 10, 2023, Aptibyte moved to dismiss the complaint in *Safety Star I*. Aptibyte argued that  
 6 Safety Star lacked standing to assert any of its trademark-based claims, that Section 230 of the  
 7 Communications Decency Act barred Safety Star’s state law claims, and that Safety Star failed  
 8 to state any claim for relief based on alleged trademark infringement. Attached hereto as  
 9 **Exhibit 2** is a true and correct copy of Aptibyte’s motion to dismiss Safety Star’s original  
 10 complaint in *Safety Star I*.

11       5.     On July 28, 2023, one judicial day before its response to Aptibyte’s motion to  
 12 dismiss was due, Safety Star filed an amended complaint under FED. R. CIV. P. 15(a)(1)(B).  
 13 Attached hereto as **Exhibit 3** is a true and correct copy of Safety Star’s amended complaint in  
 14 *Safety Star I*.

15       6.     In the amended complaint, for the first time, Safety Star relied on a purported  
 16 trademark assignment agreement dated June 4, 2018, as the basis for its alleged rights in the  
 17 trademarks on which all of its claims were based, *i.e.*, the “B-SAFE Trademarks” (B-SAFE and  
 18 BSAFE BINGO). Safety Star attached the assignment to the amended complaint, representing  
 19 that it was a “true and correct copy” of an assignment agreement “that provides [Safety Star] sole  
 20 title and right to the B-SAFE Trademarks, and thus, standing to bring this Complaint[.]” (*See*  
 21 Ex. 3 at ¶ 18.) Attached hereto as **Exhibit 4** is a true and correct copy of the trademark  
 22 assignment agreement that Safety Star attached as Exhibit 16 to its amended complaint.

23       7.     Safety Star also abandoned its state law claims in its amended complaint,  
 24 presumably in light of Aptibyte’s argument that Section 230 barred those claims.

25       8.     On August 10, 2023, Aptibyte moved to dismiss Safety Star’s amended complaint  
 26 in *Safety Star I*. In the motion, Aptibyte again argued that Safety Star lacked standing to assert its  
 27 trademark claims and that the trademark assignment agreement – which was created sometime

1 after the date identified in the assignment and likely only in response to Aptibyte's first motion  
 2 to dismiss – could not demonstrate Safety Star's standing at the time it filed the lawsuit.

3 Attached hereto as **Exhibit 5** is a true and correct copy of Aptibyte's motion to dismiss Safety  
 4 Star's amended complaint in *Safety Star I*.

5 9. In lieu of responding to Aptibyte's motion to dismiss the amended complaint, on  
 6 August 18, 2023, roughly a week before its response to that motion was due, Safety Star filed a  
 7 notice voluntarily dismissing *Safety Star I* without prejudice under FED. R. CIV. P. 41(a)(1).

8 Attached hereto as **Exhibit 6** is a true and correct copy of Safety Star's voluntary dismissal of  
 9 *Safety Star I*.

10 10. Less than a month after dismissing *Safety Star I*, Safety Star filed the present  
 11 action against Aptibyte alleging essentially the same claims, all of which are based on alleged  
 12 infringement of the B-SAFE and BSAFE BINGO marks that Safety Star purports to own.

13 11. Despite relying on an alleged trademark assignment agreement in its amended  
 14 complaint in *Safety Star I* to support its claim to ownership of the "B-SAFE Trademarks" (see  
 15 Ex. 3 at ¶ 18 and Ex. 4), Safety Star makes no mention of a trademark assignment in its  
 16 complaint in the present action (see Dkt. 1).

17 12. However, USPTO records for the two marks – B-SAFE and BSAFE BINGO –  
 18 reveal that on September 4, 2023, Safety Star recorded two new "Nunc Pro Tunc Trademark  
 19 Assignment Agreements" for the marks that are dated August 17, 2023 and that purport to be  
 20 effective as of January 22, 2019. These alleged assignments differ from the alleged trademark  
 21 assignment agreement that was attached to Safety Star's amended complaint in *Safety Star I* and  
 22 upon which Safety Star claimed ownership of the "B-SAFE Trademarks."

23 13. Attached hereto as **Exhibit 7** are true and correct copies of the "Nunc Pro Tunc  
 24 Trademark Assignment Agreements" for the B-SAFE and BSAFE BINGO marks obtained from  
 25 the USPTO's trademark assignment database.

26 14. Attached hereto as **Exhibit 8** is a true and correct copy of a PDF comparison I  
 27 prepared, comparing Safety Star's amended complaint in *Safety Star I* (Exhibit 8A) with Safety

1 Star's complaint filed in the present action (Exhibit 8B). As can be seen from the comparison,  
 2 the allegations are virtually identical in both complaints. The only notable change is Safety Star's  
 3 deletion, in its complaint in this action, of any reference to the trademark assignment agreement  
 4 that Safety Star claimed in *Safety Star I* gave it rights to the "B-SAFE Trademarks."

5 **Aptibyte's Attorneys' Fees Incurred in Defending Against Safety Star I**

6 15. Aptibyte incurred a total of \$36,635 in attorneys' fees in connection with its  
 7 defense in *Safety Star I*, of which Aptibyte seeks to recover \$36,195.

8 16. The \$36,195 in fees (representing 74.7 hours) that Aptibyte seeks to recover was  
 9 incurred in assessing and identifying defenses to and flaws in Safety Star's original and amended  
 10 complaints; negotiating, drafting, and filing a stipulated extension of the time for Aptibyte to  
 11 respond to the original complaint; drafting and filing a motion to dismiss Safety Star's original  
 12 complaint, including several state law claims; drafting and filing a motion to dismiss Safety  
 13 Star's amended complaint, including addressing the trademark assignment agreement offered for  
 14 the first time with the amended complaint; following up with Safety Star's counsel regarding the  
 15 initial deadlines for the Rule 26(f) conference and related deadlines; and reviewing and assessing  
 16 Safety Star's voluntary dismissal of *Safety Star I*.

17 17. True and correct copies of the invoices of Focal PLLC issued to Aptibyte in  
 18 connection with the fees that Aptibyte seeks to recover for defending against *Safety Star I* – with  
 19 redactions consisting only of privileged content and account information – are attached hereto as  
 20 **Exhibit 9**. Exhibit 9 consists of three invoices reflecting the following amounts: (a) Invoice  
 21 #51560 for \$13,937.50 (29.5 hours); (b) Invoice #51758 for \$13,755 (27.9 hours); and  
 22 (c) Invoice #51852 for \$8,502.50 (17.3). Focal records our time on an electronic timekeeping  
 23 system and I review each pre-bill to adjust for inefficiencies or other matters as appropriate.

24 18. The attorney timekeepers whose time is reflected on our invoices include me and  
 25 Randall Moeller. The paralegal timekeeper whose time is reflected on our invoices include  
 26 Rehan Harrach. The relevant experience of the professionals who worked on this matter is  
 27 summarized in their firm bios, true and correct copies of which are attached hereto as

1 **Exhibit 10.**

2       19. As one of Aptibyte's principal attorneys in *Safety Star I*, I am familiar with  
 3 Focal's work on the matter. I have also reviewed the invoices attached as Exhibit 9 in light of the  
 4 services provided and the issues addressed and believe the amounts set forth therein to be fair,  
 5 just, and reasonable for the services described.

6       20. My billing rate for *Safety Star I* was \$500 per hour. I have been in private practice  
 7 for more than 20 years. I was admitted to the Washington State Bar in 2000 and have been in  
 8 private practice since 2002, with a focus on commercial and IP litigation as well as counseling  
 9 clients on IP protection and disputes. After practicing for more than a decade at a boutique IP  
 10 firm in Seattle, I joined Focal in 2015, am currently a member of Focal, and assist in  
 11 management of the Focal litigation group.

12       21. Randall Moeller's billing rate for *Safety Star I* was \$500 per hour. Mr. Moeller  
 13 has practiced for more than 30 years. He was admitted to the Washington State Bar in 1991 and  
 14 has been in private practice since 1991, focusing on commercial and IP litigation as well as  
 15 counseling clients on IP issues. After practicing for more than three decades – most recently at  
 16 Perkins Coie, Graham and Dunn, and a boutique IP firm in Seattle – he joined Focal in 2023.

17       22. The paralegal who worked on *Safety Star I* – Rehan Harrach – was billed at  
 18 Focal's standard paralegal rate of \$175 per hour. Ms. Harrach has more than 10 years'  
 19 experience as a paralegal supporting attorneys in busy civil litigation practices.

20       23. The hourly rates for services charged to Aptibyte by Focal are reasonable and  
 21 comparable to – or below – the rates charged in the Seattle area for attorneys and paralegals of  
 22 comparable skill and experience in connection with similar complex litigation, including  
 23 litigation involving intellectual property issues.

24       I declare under penalty of perjury under the laws of the United States that the foregoing is  
 25 true and correct to the best of my knowledge.

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1 Executed this 5th day of October, 2023, at Seattle, Washington.  
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3 *s/ Stacia N. Lay* \_\_\_\_\_  
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